
**COMPARATIVE REPORT ON THE
APPLICATION OF ASYLUM STANDARDS TO
PROTECT WOMEN TRAFFICKED FOR
SEXUAL EXPLOITATION**

**AN ANALYSIS OF THE LAWS OF THE
UNITED STATES, FRANCE, CANADA,
LUXEMBOURG AND THE UNITED KINGDOM**

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I. Introduction: Overview of The Refugee Convention

The preamble to the United Nations Charter,¹ as well as the Universal

Declaration of Human Rights² (“Declaration”) includes gender among the prohibited grounds of discrimination fundamental to the concept of human rights. Article 2 of the Declaration states:

Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, **sex**, language, religion, political or other opinion, national or social origin, property, **birth or other status...**
[emphasis added]

In the aftermath of World War II, the United Nations became acutely aware of the problems of refugees and the need to ensure their basic rights.³ In response, the United Nations adopted the Convention Relating to the Status of Refugees⁴ (“Convention”) and, later, the United Nations Protocol Relating to the Status of Refugees⁵ (“Protocol”) (together as “Refugee Convention”)⁶ which set forth international standards for the treatment of refugees.

With the adoption of these instruments, the United Nations sought to strengthen international cooperation and solidarity on behalf of refugees, as well as depoliticise the act of granting asylum.⁷ Under the Convention, a “refugee” is defined as:

[O]ne who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...⁸

The Refugee Convention itself does not expound upon the intricacies of each individual factor of the definition of a refugee. Its ideal is that “human beings shall enjoy fundamental rights and freedoms without discrimination,” thereby warranting against serious harm inflicted for reasons of personal status.⁹

One concern when evaluating trafficking victims eligibility for refugee status is the issue of

¹ United Nations Charter, Article 1(3).

² Universal Declaration of Human Rights, Articles 2 & 7 (1948).

³ See <http://untreaty.un.org/English/millennium/law/v-14.htm>.

⁴ Convention Relating to the Status of Refugees, approved Dec. 10, 1948, *opened for signature* July 28, 1951, 189 U.N.T.S. 137., *available at* http://www.unhchr.ch/html/menu3/b/o_c_ref.htm.

⁵ Protocol Relating to the Status of Refugees, approved for signature Jan. 31, 1967, *opened for signature* Jan. 31, 1976, 606 U.N.T.S. 267.

⁶ Although the Protocol is an independent international treaty, the majority of states that are party to one are contracting parties to both the Convention and the Protocol.

⁷ See <http://untreaty.un.org/English/millennium/law/v-14.htm>.

⁸ Convention, Article I (a) (2). 189 UNTS 137.

⁹ Haines, R. Forthcoming, *Gender-Related Persecution*, Cambridge, Cambridge University Press, pg. 26 (2001), *available at* <http://www.nzls.org.nz/conference/pdf%20files/HainesSu9.pdf>.

where the persecution took place. Generally, an individual seeking asylum is seeking protection in a country where they will be safe from persecution and not in a country where they have suffered persecution. Yet trafficking raises novel issues, as its victims are generally not exposed to the society into which they are trafficked. Rather, they are segregated and separated, living under lock and key, at the mercy of their traffickers. For the most part, these traffickers are from the victim's home country, or are in some way connected to that country. Therefore, it is arguable that despite her presence within the physical borders of a host country, the trafficking victim does not have access to the safeguards offered there. Rather, she remains guarded within the confines of her home country. It is only when she is liberated from the trafficking situation that she is able to avail herself of the legal remedies offered in the host country.

The Refugee Convention supports this theory to the extent that the individual fears persecution in the home country. The test under Article 1 requires only that the applicant is unable or is unwilling to return to his/her home country owing to a fear of being persecuted there. Similarly, the proposed EU Directive 2001/0207 on minimum standards for the qualifications and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (the "Proposed Directive"), the persecution or fear of being persecuted may stem from events or activities which have taken place since the applicant left his/her country of origin (Article 8).¹⁰

Central to the humanitarian purpose of the Refugee Convention is the principle of "non-refoulement." Non-refoulement is an established principle of customary international law which prohibits governments from forcibly returning individuals who have reason to fear for life or liberty in their countries of origin.¹¹ The preamble to the 1951 Convention reiterated the United Nations' commitment to "assure refugees the widest possible exercise of these fundamental rights and freedoms."¹²

While sex or gender is not explicitly mentioned as an enumerated ground, the context and purpose of the Refugee Convention lead to a recognition that a gender-inclusive and gender-sensitive interpretation be utilised.¹³ Sex-based groups are examples of innate and immutable characteristics which may fall properly within the domain of the social group category.¹⁴ There is no reason to assume that the phrase "particular social group" is meant to be confined to small narrowly-defined groups or exclude women.¹⁵

¹⁰ This Directive has not been adopted yet, but may be used as persuasive guidance.

¹¹ See Convention, Article 33, 189 UNTS 137. Demir, Jenna Shearer, *Trafficking of Women For Sexual Exploitations: Gender-Based Well-Founded Fear?*, University of Pavia ESAS-CS, pg. 29 (January 2003). In 1977, the UNHCR extended this principle to include those subject to persecution if returned, irrespective of whether they have been granted formal recognition as refugees.

¹² Convention, preamble.

¹³ *Id.* at 4.

¹⁴ *Id.* at 110. According to the UNHCR Handbook, a "particular social group" normally comprises persons of similar background, habits or social status. UNHCR Handbook at para. 73.

¹⁵ "The phrase 'membership in a particular social group' has to be left to evolve in line with society's understanding of groups within it. ...There is no reason, therefore, to assume that the phrase 'particular social group' in the Refugee Convention is meant to be confined to narrowly defined, small groups of people...The members of the social group may not know each other, may not even consider themselves part of the social group and the only thing that nominally united them is the characteristic which gives rise to the

It is a sad fact of history that until quite recently, states have not afforded women equal protection under the Refugee Convention, or most other laws. With the growing recognition of gender equality, the UNHCR and Executive Committee of High Commissioner have made efforts to correct this problem in terms of the Refugee Convention.¹⁶ In the General Conclusion on International Protection, the Executive Committee:

...calle[d] upon the High Commissioner to support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women...In accordance with the principle that women's rights are human rights, these guidelines **should recognize as refugees women whose claims to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, including persecution through sexual violence or gender-related persecution.**¹⁷ [emphasis added]

In keeping with this commitment, in 1996 the UNHCR formally identified sexual violence as a form of torture,¹⁸ and in 2002 issued Guidelines that suggested trafficking for the purpose of sexual exploitation may provide a basis for a refugee claim:

Some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender related violence or abuse that can even lead to death. **It can be considered a form of torture** and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identity documents. In addition, trafficked women and minors face serious repercussions after escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family

persecution." European Council On Refugees and Exiles, *Position on the Interpretation of Article 1 of the Refugee Convention*, Points 56-58 (September 2000).

¹⁶ Haines, *see note 9*, at 2. *See Guidelines on the Protection of Refugee Women* (July 1991), UNHCR, *Sexual Violence Against Refugees: Guidelines on Prevention and Response* (1995), the Symposium on Gender-Based Persecution held at Geneva 22-23 February 1996 (reported in (1997) *IJRL Special Issue 1-251*) and UNHCR, *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999). *See also Guidelines on the Protection of Refugee Women*: Legal Procedures and Criteria for the Determination of Refugee Status, UN Doc. ES/SCP/67 (1991); *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, U.N. GAOR, 48th Sess, Supp. No. 49, at 217, UN Doc. A/48/49/(1993).

¹⁷ Haines, *see note 9*, at 3. UN doc A/AC.96/878, IIIA.1.(o) and *see generally* UNHCR Division of International Protection, "Gender-Related Persecution: An Analysis of Recent Trends" (1997) *IJRL Special Issue 79 - 80*. *See also the Platform for Action adopted at the Beijing Fourth World Conference on Women* in September 1995, particularly para 136 which called upon States to consider recognizing as refugees women who face persecution.

¹⁸ In a joint report with the World Health Organization. UNHCR/WHO, *Mental Health of Refugees*, Geneva Switzerland (2002).

ostracism, or severe discrimination. **In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threat of harm.**¹⁹ [emphasis added]

Over the past decade, refugee analysis relating to sex and gender has advanced significantly. This is particularly true in cases involving sexual violence against women and children, and has led to gender-sensitive interpretations of refugee law.²⁰ Although the signatories to the Convention and Protocol have agreed to protect refugees in accordance with the terms of these instruments, construction of the individual provisions is left to each individual state. As such, the international interpretations of these instruments, including the UNHCR Handbook and other U.N. Conventions, are useful tools, but not necessarily binding upon the signatories. Thus, while it is a plausible interpretation and implicit within the humanitarian purpose of the Refugee Convention that certain groups of women, such as those victimised by traffickers, be granted the protection under these instruments, each country may make its own determinations based upon the circumstance of the individual victim and its understanding of what constitutes the definition of a refugee.

In recent years, a number of states have established precedents indicating an advance towards recognizing gender motivated persecution under the refugee definition. This may set the grounds for granting trafficked women refugee status.²¹ The following is an analysis of the treatment of gender based asylum claims by five signatories to the Convention and Protocol - the United States, France, Canada, Luxembourg and the United Kingdom - and how such treatment may be used to advocate for asylum status on behalf of trafficking victims.

II. UNITED STATES

A. Introduction

The United States acceded to the U.N. Protocol in 1968, and with the enactment of the Refugee Act of 1980²² (“Refugee Act”), the U.S. Congress formally adopted the Protocol definition of a refugee as the basis for asylum and refugee²³ claims in the United States. Under the Refugee Act, in order to meet the statutory standard for asylum, an applicant must satisfy the elements of the definition of refugee which include: a “fear” of “persecution”; that

¹⁹ UNHCR, *Guidelines on International Protection: Gender Related Persecution* (2002).

²⁰ Haines, *see note 9*, at 3-4. The international community has recognized sexual violence as a crime against humanity and as a war crime. *See Rome Statute of International Criminal Court*, Articles 7 and 8.

²¹ Demir, *see note 11*, at 35.

²² Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.)

²³ For claims in the United States, the term refugee refers to someone outside the United States, while asylee refers to someone present in the United States who meets the definition. In the case of an applicant who has been trafficked into the United States for commercial sex purposes, the applicant will be seeking asylee status.

the fear be “well-founded”²⁴; that the persecution be “on account of race, religion, nationality, membership in a particular social group, or political opinion”; and the applicant must be “unable or unwilling to avail...herself of the protection of” her home country because of the persecution or her well-founded fear of persecution.²⁵ In the U.S., applicants who can show they have suffered “past” persecution, need not establish a fear of future persecution.²⁶

U.S. case law has not yet directly addressed the specific question of whether sex trafficking of women constitutes persecution and whether female victims of trafficking constitute a protected social group, thus entitling victims to asylee status. This absence may be attributable to the fact that victims of trafficking have been afforded additional protections and immigration relief under the Trafficking Victims Protection Act of 2000 (“TVPA”) which created a “T visa” providing protection for trafficking victims who cooperate in the prosecution of their traffickers.²⁷ Several decisions do, however, give some indications of how the issues of persecution and social group may be addressed under U.S. law.

B. Discussion

1. Persecution

The Board of Immigration Appeals (“BIA”) has interpreted persecution to include threats to life, confinement, torture and economic restrictions so severe that they constitute a threat to life or freedom.²⁸ Rape and other forms of sexual abuse have been officially recognized as behaviours which may be considered persecution.²⁹ In *Lopez-Galarza v. INS*, the court noted that legacy INS³⁰ Guidelines indicate “that female applicants may face unique ‘gender

²⁴ Well- Founded Fear: In *Matter of Chen*, the BIA established a three-part analysis for granting asylum based on past persecution alone: (1) has the applicant suffered past persecution; (2) if so, has the INS rebutted the presumption of well-founded fear by showing there is little likelihood of present persecution due to changed country conditions; and (3) even if the INS meets this burden, should asylum be granted for humanitarian reasons, based on an exercise of the judge's discretion. *Matter of Chen*, Int. Dec. 3104 (BIA 1988), at 8. In order to establish past persecution, the victim must provide credible testimony sufficient to meet the burden of proof and corroborating evidence when possible. If the victim is unable to establish past persecution, a well-founded fear of persecution based upon showing of objective fact and subjective fear is required.

²⁵ Section 101(a)(42)(A) of the Act, 8 U.S.C. §1102(a)(42)(A). Although, ultimately the grant of asylum is at the discretion of the immigration judge.

²⁶ Applicants who have suffered past persecution need not demonstrate a well-founded fear of persecution. INA § 101(a)(42)(A); 8 U.S.C. & 1101(a)(42)(A). See also *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988). In such cases, a rebuttable presumption also arises that victim has a well-founded fear of future persecution. See 8 C.F.R. § 208.13(b)(1)(i) (1997).

²⁷ Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386 Division A, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 22 U.S.C.).

²⁸ See *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985), overruled by *Matter of Mogharrabi*, 19 I. & N. 434 (BIA 1987).

²⁹ See *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996) (finding the refugee's imprisonment, rape and other physical abuse to be persecution). See also *Basova v INS*, 1999 U.S. App. LEXIS 15715, 6-7 (10th Cir. July 14, 1999); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

³⁰ On March 1, 2003, the Immigration & Naturalization Service (“INS”) ceased to exist, and the functions previously assigned to the INS have become part of the Department of Homeland Security (“DHS”). Within DHS, asylum applications are adjudicated by the Asylum Office within the U.S. Citizenship and Immigration Services (“USCIS”).

persecution,’ which includes rape and sexual abuse and provide that ‘rape and other forms of severe sexual violence’ are examples of physical harm that constitutes persecution.”³¹

Since trafficking usually involves entry into prostitution by means of violent force, fraud or coercion, and thus forced sexual acts or rape, it follows that the acts of trafficking should form the basis to establish persecution. The repeated sexual abuse endured by many victims of trafficking can constitute the type of disregard of human dignity which “shocks the conscience.”³² In addition to sexual abuse, the victims are often forced to live in confinement, beaten, denied pay and medical treatment, and placed at risk of contracting HIV and other sexually transmitted diseases. These abuses constitute threats to life and freedom and, therefore, bolster the argument that forced sex trafficking falls clearly within the realm of persecution.

2. “On Account Of” Membership in a Particular Social Group

U.S. law requires looking beyond the abusive behaviour itself to the motive of the perpetrator. The purpose of this is to establish that “persecution” occurred on account of a protected ground. The issue here is to distinguish persecution from criminal or inhumane behaviour. In simple terms, not every victim of rape or other sexual abuse has been “persecuted.” Once persecution has been established, the analysis must turn to the nexus between the abuse and the five enumerated protected groups. In the case of a victim of sex trafficking, the persecution suffered will most like fall within the ground “membership in a particular social group,” although the other enumerated grounds may be explored.

In the U.S., the authorities adjudicating asylum petitions are reluctant to find gender alone as constituting a particular social group. Rather, in cases involving sexual abuse, many adjudicators who granted asylum, pointed to the victim as being in, or associated with, a particular political group.³³ According to the legacy INS Guidelines, “membership in a particular social group is perhaps the least clearly defined ground for eligibility.”³⁴ U.S. courts have “struggled” with this concept.³⁵ In *Matter of Acosta*, the BIA stated that “‘persecution on account of membership in a particular social group’ encompasses persecution that is directed toward an individual who is a member of a group’ of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship.”³⁶ More generally, a particular social group has

³¹ *Lopez-Galarza*, 99 F.3d at 963 (*INS Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (“**Guidelines**”) at 9). Furthermore, the *Guidelines* state that “severe sexual abuse does not differ analytically from beatings, torture or other forms of physical violence that are commonly help to amount to persecution.” *INS Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, p. 9 (May 26, 1995).

³² See *Matter of Kasinga*, 21 I. & N. Dec. 357.

³³ See *Lopez-Galarza* (which pointed to her known affiliation to the Somoza regime as the basis for the assaults by Sandinista supporters) and *Lazo-Majano v. INS*, 813 F.2d. 1432 (9th Cir. 1987), overruled on other grounds by *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (pointing to the perpetrator calling the victim a “subversive”).

³⁴ *Guidelines* (see note 31) at 12.

³⁵ *Fatin v. INS*, 12 F.3d 1233, 1238 (3d. Cir. 1993) (where the court considered whether an Iranian women who refused to wear a veil could make a claim based on gender).

³⁶ *Acosta*, see note 28

been found where the members share an immutable characteristic that they cannot change, or should not be required to change.³⁷

U.S. courts have been divided as to whether gender alone or gender along with other characteristics can constitute a “social group.” In *Gomez v. INS*, the court stated that “broad-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”³⁸ Yet the courts have found that gender in tandem with another element can establish social group. For example, in the landmark case *In the Matter of Kasinga*,³⁹ the BIA found that fear of female genital mutation was grounds for granting asylum since it was based on the applicant’s membership in a social group of young women in Togo who had not undergone the ritual mutilation and were opposed to it. In *Kasinga*, the fact that the victim was targeted based on her gender was dispositive.

An Immigration Law Judge subsequently applied *Kasinga* to the case of a Chinese woman who was forced (with the knowledge of the police) into working as a prostitute in her home country, China.⁴⁰ The court found, following *Kasinga*, that forced entry into prostitution is a form of persecution entitling the victim to asylum status. Although this forced prostitution was in the home country and not the host country, the case still provides a precedent that female victims of forced prostitution may be eligible for asylum status.

Yet recognizing gender as a targeted group is not sufficient. In *Fatin v. INS*, the court emphasized that an Iranian woman who feared persecution because of being a woman could be a member of a particular social group. However, Ms. Fatin was denied asylum because she had not shown that the persecutors would seek to persecute her based solely upon her gender.⁴¹ Ms. Fatin did not argue that she risked persecution solely for being female, but for being a member of a specific subgroup of Iranian women who may refuse to conform to the government’s gender-specific laws.⁴² In this case, the court’s decision turned on the fact that Ms. Fatin did not say that she absolutely would not conform to those laws. While the court did find that Iranian women could constitute a social group, it determined that its members were not at risk of persecution as defined by the Refugee Act.

In contrast to those cases that established a nexus between the persecution and a social group,⁴³ two cases which, although finding sexual abuse, denied asylum because the persecution suffered was not on account of membership in a particular social group.⁴⁴ In *In re R-A*, - the applicant claimed membership in a group of Guatemalan women in intimate relationships with Guatemalan men who believed women should be dominated. While the applicant had met the basic *Acosta* test of immutable or fundamental characteristics,⁴⁵ the

³⁷ *In re R-A*-, see note 44.

³⁸ *Gomez v. INS*, 947 F.2d 660, 664 (2nd Cir. 1991).

³⁹ *Matter of Kasinga*, 21 I. & N. Dec. 357.

⁴⁰ See *In Re J-M*-, (Immigration Court San Pedro 1996).

⁴¹ *Fatin*, 12 F.3d at 1240.

⁴² *Id.* at 1241. See also *Guidelines* (see note 31) at 14.

⁴³ *Lopez-Galarza, Lazo-Majano and Kasinga*

⁴⁴ See *Basova v. INS*, Lexis 15715 (10th Cir. 1999) (finding the rape and other heinous behaviour at the hands of the Chechen mafia to be on a personal level and not persecution). *In re R-A*-, 2001 BIA LEXIS 1; 22 I. & N. Dec. 906 (BIA 1999) (finding rape and other long term abuse by husband to be personal and not persecution).

⁴⁵ *Acosta*, see note 28, at 17.

BIA determined that such a group does not constitute a *qualifying* social group because it seems to bear no relation to the way in which Guatemalans might identify societal subdivisions and was, therefore, largely abstract. Moreover, the BIA found that the husband's behaviour was not targeted against his wife because of her membership in a group, nor even because she did not accept his view of men dominating women. In its decision not to recognize a social group, the BIA noted that the husband of the victim had not behaved in that way towards any other women in Guatemala. The BIA found this indicative of the fact that the behaviour did not attach to the social group. In essence, the BIA added a subjective element to the definition (i.e., do people generally in the home country recognize the existence of the alleged social group?). Moreover, the characteristic as understood in the applicant's society or by potential persecutors would not be seen "as warranting suppression or infliction of harm."⁴⁶

Adding to the *Acosta* test, the BIA determined that, as in *Kasinga*, the critical element in social group analysis by common characteristics is whether the potential persecutors identify the characteristics as a basis for the infliction of harm.⁴⁷ Therefore, mere shared attributes are not sufficient. The dissenting opinions, however, found no meaningful distinction that justified the majority's recognition of the social group claim in *Kasinga* while refusing to recognize the particular social group claim in *R-A-*. Although this decision marked a set back in the expansion of the definition of social group, it does not necessarily foreclose the possibility of other gender-based social groups.⁴⁸

Therefore, for trafficking to be seen as persecution, under these precedents it will have to be shown that the victims are part of a "particular social group" and that the abuse is on account of their being a member of that group. An important element of establishing "persecution on account of" is that the persecution suffered by an individual woman (as in *In re R-A-*), but rather by definition involves the systematic persecution of a group of women. Trafficking, by its nature, is directed at groups and not merely at one individual.

If a social group and the existence of persecution can be applied in trafficking cases, the fact that the government is not directly causing the persecution is not dispositive in U.S. cases.⁴⁹ Both *Basova* and *In re R-A-* were not troubled by the fact that the behaviour was perpetrated by people with no affiliation to the government. *Basova* recognized that the government could not control the Chechen mafia and *In re R-A-* admitted that the Guatemalan government failed to offer any assistance to battered women or to prevent the behaviour. Thus, what is important in an asylum application is evidencing that the respective government is unable or unwilling to stop trafficking and/or protect its victims. As trafficking organizations are frequently run by the mafia, organized criminal groups, or are complicit with government officials in source countries, state action or inaction can be established.

⁴⁶ *Acosta*, see note 28, at 31.

⁴⁷ *Kasinga*, see note 32.

⁴⁸ An argument could be made that the decision is limited to the facts of the case, which raises as the sole basis of her claim the violence Ms. Alvarado experienced at the hands of her husband and that the BIA failed to analyze the claim in a human rights framework.

⁴⁹ Under U.S. case law, it is clear that the persecutor can be either a government or a non-government entity that the government is unable or unwilling to control. See *Matter of Villalta*, Int. Dec. No. 3126 (BIA 1990).

It has not yet been determined by U.S. case law whether a female victim of sexual trafficking can constitute a particular social group. It is clear that these victims share the immutable characteristic of sex, as set out in *Acosta* and suggested by *Fatin*. If, as in *Kasinga*, social group may be defined by the combination of gender and other factors, certain groups of trafficked females can define a social group by not only shared gender, but perhaps socio-economic, ethnic or family affiliations⁵⁰ and opposition to trafficking and/or prostitution. In other words, what characteristics do the perpetrators in a particular country use to select their victims? Analysis of particular situations may reveal one or more demographic trends. Furthermore, trafficking victims may be able to overcome the *In re R-A-* analysis by establishing that persecutors would see the common characteristics of being a returned victim of sexual trafficking as constituting a separate social group which warrants the infliction of harm. UNHCR studies and guidelines demonstrate that trafficked women face serious and even deadly repercussions after escape or upon return, “such as reprisals or retaliation from trafficking rings and individuals, possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination.”⁵¹

By establishing returned trafficked women as a social group with shared gender, victimisation, opposition to sex trafficking and other characteristics, coupled with a showing that the potential persecutors are aware of the victim’s status and have the capability and inclination to target the victims, a plausible claim for asylum status can be made, even in light of the BIA’s determination in *In re R-A-*.

III. FRANCE

A. Introduction

As a preliminary remark, France has recently adopted a law to encourage sex trafficking victims to report traffickers to the police.⁵² The reporting victims may be granted a residence and work permit as well as rehabilitation assistance, under certain circumstances.

By contrast, the status of refugee, when granted, gives the refugee an unconditional right to asylum in France. In addition, asylum under the status of refugee offers more protection than a mere residence permit. The circumstances in which asylum may be revoked under the Refugee Convention are more restrictive than the circumstances in which a residence permit may be revoked.

Three types of asylum are available in France:

- constitutional asylum, for people persecuted because of their actions for freedom;
- conventional asylum under the Geneva Refugee Convention of July 28, 1951 and the New York Protocol of January 31, 1967, as implemented in France by the Law of July 25, 1952 as amended; and

⁵⁰ This is, however, dependent upon factual circumstances and country conditions.

⁵¹ See note 19.

⁵² See Law 2003-239 of March 18, 2003.

- subsidiary asylum for people whose life or freedom is threatened in their home country or who may be at risk of torture or a degrading or inhuman treatments or punishments there.⁵³ Subsidiary asylum may be an option for applicants to whom the status of refugee has been denied because they did not meet the conditions of the Refugee Convention.

In practice, less than 10% of the applicants are granted refugee status and another 5% are granted subsidiary asylum.⁵⁴

B. Discussion

1. Persecution

According to French case law, the alleged persecution or fear of being persecuted must be current and characterised as sufficiently serious and personal to the applicant. Persecution is defined as a threat to life, safety or freedom, torture, an inhuman or degrading treatment or punishment, or a severe violation of human rights.⁵⁵ If the applicant has in fact already been persecuted, the existence of a current fear of being persecuted is likely to be allowed, unless the country of origin is now able to offer the needed protection because of a change in political conditions (*CRR, SR, April 9, 1999, Poouv*).

Discrimination may not be necessarily regarded as sufficiently serious to qualify as “persecution.” For example, women living a Western life style in Islamic countries, such as Algeria and Afghanistan under the Taliban rule, were not regarded as being persecuted in the absence of specific circumstances (*CRR, December 14, 1999, Zhoual; CRR, November 23, 1988, Ayoubi*). Similarly, asylum was denied to a transsexual who had been discriminated against and humiliated in Ecuador. The court considered that because homosexuality had been legalised there, the applicant could not establish a well-founded fear of suffering serious persecution (*CRR, June 24 1999, Esteves Burneo*).

The “personal to the applicant” test is presumed to be met when the applicant was actually persecuted (*CE July 10, 1996, Ranamukage*). When the applicant alleges a fear of being persecuted, the test will be whether such fear is personal enough to the applicant (*e.g.*, he/she or members of his/her family have been persecuted).⁵⁶ By contrast, it has been held that the applicant’s Hutu ethnicity did not suffice to establish his personal fear of being persecuted in Rwanda in 1994, in the absence of other circumstances (*CE, September 29, 1999, Madera*).

Law 2003-1176 of December 10, 2003 amending Law 52-893 of July 25, 1952, spells out that the persecution necessary to gain asylum may be carried out by a non-governmental force when no authority (including governmental, regional or international authorities) can grant effective protection.⁵⁷ French courts usually require strong evidence of the

⁵³ See Article 2, II, 2 of Law July 25, 1952 as amended.

⁵⁴ “*Quel asile en France?*,” Elise Vallois, October 2003.

⁵⁵ See Article 2, II, 2 of Law 2003-1776.

⁵⁶ In *CRR, December 7, 2001, Ms. A.*, the court granted refugee status to a Somalian mother who refused that her daughter be excised, considering in particular that her elder daughter had already been excised against her will.

⁵⁷ Law 2003-1176 specified that asylum can be denied if the alleged persecution is confined to part of the territory and the applicant could be reasonably returned to another part of his country of origin. This

unwillingness or inability of a state of origin to protect the victim from non-governmental persecutions. Specifically, the victim must establish that she had effectively applied to the local authorities for help and was denied such help. Accordingly, asylum has been granted to parents trying to protect their daughter from genital mutilation (excision), when they could establish they were assaulted and reported such aggression to the local police, which refused to intervene (*CRR, December 7, 2001, Sissoko*). By contrast, asylum was denied to an applicant alleging the fear of excision who could not establish that she had sought and had been denied protection from local authorities, although excision was commonly practiced in the applicant's country (*CE July 29, 1998, Diop*).

If the applicant did not apply to the local authorities for protection, she must establish that it was well-founded to believe that they would not have intervened. Asylum has been granted to an applicant who proved she could not report to the police persecution by the mafia, because the police had assaulted her in the past (*CRR, January 27, 2000, Berkova*). Similar reasoning was applied to a person who claimed he could not apply to the police for protection because a relative of his was murdered and, despite his request to the police, the murderer was left free (*CRR, October 25, 2000, Ms. Hadzadic*). Corruption of the local police has not, however, been regarded as sufficient to establish their inability to grant help in the absence of other circumstances (*CRR July 3, 2002, Lezha*).

2. "On Account of" Membership in a Particular Social Group

In defining the right to conventional asylum, French law⁵⁸ relies on the enumerated grounds established by the Refugee Convention, including membership of a particular social group. French case law is generally reluctant to admit the existence of a particular social group and uses this concept only when the other reasons cannot be established. This is especially the case when such groups encompass a large number of people (*e.g.*, women),⁵⁹ unless the group was especially targeted for serious and personal persecution. French courts have defined 'particular social groups' based on specific instances of persecution suffered by such groups, in other words, "*a group whose members might be, because of the way they are seen by the authorities or society, exposed to persecution*" (*CE June 23, 1997*).⁶⁰

provision should not however apply when the persecution is sponsored or tolerated by a national government. Note also that under Law 2003-1176, France, like the other EU Member States, is to establish a list of so-called "safe-countries". Such list will create a rebuttable presumption that the applicant's country of origin is able to grant him/her the needed protection. To our knowledge, such list has not been established yet and there is no deadline set for its adoption.

⁵⁸ See Article 2, I, of Law July 25, 1952 as amended.

⁵⁹ Note, however, that pursuant to the Proposed Directive, it is "immaterial whether the applicant comes from a country in which many or all persons face the risks of generalized oppression" (Article 11.2, c)).

⁶⁰ Note also the broader definition set forth by the Proposed Directive: "the concept of social group shall include a group which may be defined in terms of certain fundamental characteristics, such as sexual orientation, age or gender, as well as groups comprised of persons who share a common background or characteristic that is so fundamental to identity or conscience that those persons should not be forced to renounce their membership. The concept shall also include groups of individuals who are treated as "inferior" in the eyes of the law". (Article 12, d)). In addition, the explanatory memorandum to the Proposed Directive states that "a group may be defined by a fundamental characteristic, such as gender (...). The concept is not confined to narrowly defined, small groups of persons and no voluntary association or de factor cohesion is required. (...) The definition should also allow for the inclusion of groups of individuals who are treated as "inferior" (...). This may be the case in situations where women are victims of domestic

For example, it has been held that the fear of a sterilisation campaign does not render the applicant eligible for the status of refugee, since it targets all couples without discrimination and not personally the applicant (*CE December 29, 1993, Cheng*). In this case, the court noted that the fact the applicant was the mother of five children and therefore subject to higher pressure did not characterise her membership of a particular social group. Similarly, it has been held that a Malian woman refusing a forced wedding with a polygamous man did not belong to a particular social group and was not eligible to refugee status (*CRR, May 7, 2001, Kebe*). French courts have, however, used the concept of “particular social group” to grant asylum to women facing a risk of excision, when such women could establish specific circumstances founding their fear, beyond the risk of being targeted owing to their gender in a country where excision is common practice.⁶¹

Similarly, while they generally refused to recognise that women living a Western life style in Algeria or the Taliban’s Afghanistan constitute a “particular social group” (*CRR, December 14, 1999, Zhoual; CRR, November 23, 1988, Ayoubi*), French courts have relied on specific circumstances to grant asylum. Specifically, French courts look at the intent of such women to continue their professional career or to engage in political activities (*CRR September 18, 2000, Ms. Manad, CRR April 15, 1999, Ms. Berang*).

However, in one case involving an Albanian woman who had contended she was threatened into joining a prostitution network operating in Italy, the court suggested that gender could be used to develop an asylum case. In this case, the court denied asylum based on a finding that the woman could not establish that the pressure and threats she alleged amounted to “persecution,” and that she failed to establish that she was denied protection from the local police. The court held, therefore, that she could not contend that she was persecuted. (*CRR, July 2, 2002, Lezha*). Nevertheless, based on this case, it appears that if the victim can establish she was coerced into prostitution and was denied protection in her home country, she may be able to gain asylum in France.

With respect to homosexuals or transsexuals, French courts use the “particular social group” concept on a case-by-case basis, considering whether the applicant has actually been persecuted or has a well-founded fear of being persecuted, and the seriousness of the persecution. In these cases, the decisions seem to turn on whether homosexuality is a criminal offence in the home country. For example, asylum was granted to an homosexual who suffered persecution in Algeria where homosexuality is a criminal offence (*CRR, May*

violence, including sexual violence and mutilations, in such States where they are unable to obtain effective protection against such abuse because of their gender or social status as married women, daughters, widows or sisters, in that particular society.”

⁶¹ See *CRR, December 7, 2001, Sissoko*. In such case, the court noted that the parents refusing the ritual excision of their daughter had been threatened and assaulted. They had reported their aggression to the local police, which refused to intervene. The court concluded that because they refused that their daughter be excised and underwent persecution tolerated by local authorities, the parents belonged to a particular social group and were eligible for refugee status. In *CRR, December 7, 2001, Ms. A.*, the court granted refugee status to a Somali mother who refused that her daughter be excised, considering the persecutions existing in Somalia against women refusing the excision ritual and the specific circumstances of the case (single mother deprived from any protection, whose elder daughter had already been excised against her will). By contrast, in *CE July 29, 1998, Diop*, the refugee status was denied to an applicant alleging a fear of excision when it was not established that the applicant sought and was denied protection from local authorities, although excision was commonly practiced in the applicant’s country.

12, 1999, *Djellal*), but not to a transsexual who was discriminated against and humiliated in Ecuador, where homosexuality has been legalised (*CRR, June 24 1999, Esteves Burneo*). In the latter case, the court found that the treatment the transsexual suffered was merely discriminatory, not rising to the level of persecution.

IV. CANADA

A. Introduction

Canada has been an international leader in the area of refugee recognition and protection. Pursuant to its obligations as a state party to the Refugee Convention, Canada has accepted the Convention definition of refugee.⁶² An independent administrative tribunal, the Convention Refugee Determination Division (**“Refugee Division”**) of the Immigration and Refugee Board, was expressly created under national legislation to accomplish the task of determining refugee and asylum status. The Refugee Division allows claims to be considered on the basis of gender as provided by Canadian Immigration and Review Board issued *Guidelines On Women Refugee Claimants Fearing Gender-Related Persecution* (**“Guidelines”**).⁶³ Canada issued these guidelines in 1993, and in was the first country to issue such guidelines. Due to its deference to international instruments and its paramount concern for human rights, Canada has long recognised sexual abuse and violence as persecution in refugee and asylum analysis. Therefore, the more pertinent question has become - what constitutes a social group and is there a nexus between the particular social group and the persecution within the Convention meaning?

B. Discussion

1. Persecution

The concept of “persecution” has not been well-defined in the Refugee Convention or under national legislation.⁶⁴ However, the Supreme Court has determined that the theme that human beings shall enjoy fundamental rights and freedoms without discrimination, as articulated in the Charter of the United Nations and the Universal Declaration of Human Rights, sets the framework for interpretation of the definition of a “Convention refugee.”⁶⁵ In

⁶² See note 4.

⁶³ Canadian Immigr. And Review Bd., *Guidelines On Women Refugee Claimants Fearing Gender-Related Persecution* (March 1993). “The definition of a Convention refugee in the *Immigration Act* does not include gender as an independent enumerated ground for a well-founded fear of persecution warranting the recognition of Convention refugee status. As a developing area of the law, it has been more widely recognized that gender-related persecution is a form of persecution which can and should be assessed by the Refugee Division panel hearing the claim. Where a woman claims to have a gender-related fear of persecution, the central issue is thus the need to determine the linkage between gender, the feared persecution and one or more of the definition grounds.” Canadian Immigr. And Review Bd., *Guidelines On Women Refugee Claimants Fearing Gender-Related Persecution: Update* (November 1996), available at http://www.cisr.gc.ca/en/about/guidelines/women_e.htm#AIII.

⁶⁴ See *Interpretation of the Convention Refugee Definition in the Case Law*, Legal Services, Immigration and Refugee Board (December 31, 2002), available at http://www.cisr.gc.ca/en/about/tribunals/rpd/crdef/index_e.htm#toc.

⁶⁵ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at 733.

*Canada v. Ward*⁶⁶, the Court stated that “[p]ersecution”, for example, undefined in the Convention, has been ascribed the meaning of “sustained or systemic violation of basic human rights demonstrative of a failure of state protection”;...[and] that “comprehensive analysis requires the general notion [of persecution] to be related to developments within the broad field of human rights.”⁶⁷ Accordingly, the mistreatment suffered or anticipated must constitute a serious harm to human dignity rising above the level of mere discrimination, and in most circumstances such harm must be a sustained or systematic violation of human rights under the Canadian interpretation.⁶⁸

Case law provides further insight as to what types of behaviours constitute persecution. Rape and physical violence have been found to be prime examples of persecution.⁶⁹ Threats to female sexual or bodily integrity are often found to constitute persecution as well (such as forced marriages,⁷⁰ forced or coerced sterilization,⁷¹ female circumcision⁷² and forced abortion have also been found to constitute persecution⁷³). Furthermore, coercion and threats of bodily harm or death may rise to the level of persecution depending upon the individual circumstance.⁷⁴ The aforementioned harms are frequent components of the offences to human dignity suffered by victims of trafficking. Given the fact that these victims have been granted asylum in Canada in the past, it is clear that persecution or a well-founded fear of persecution can be found in such instances.⁷⁵

2. “On Account of” Membership in a Particular Social Group

In *Ward*,⁷⁶ the Supreme Court closely considered the construction of social group. Justice La Forest, speaking for the Court, stated:

⁶⁶ *Id.*

⁶⁷ *Id.* at 733-34 (citing Hathaway and Goodwin-Gill). See also *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.), at 324-5. Justice La Forest (in the dissent in *Chan*,) further stated that “[t]he essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way.” *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, at 635.

⁶⁸ Some types of harm are incapable of repetition, such a female circumcision, but are considered sufficiently severe to rise to the level of persecution. *Muthuvar v. M.C.I.* (F.C.T.D., no. IMM-2095-95), Cullen, February 15, 1996. Cullen J., declining to certify, stated at 5: “I think it is settled law that, in some instances, even a single transgression of the applicant’s human rights would amount to persecution.” See also *Gutkovski v. S.S.C.* (F.C.T.D., no. IMM-746-94), Teitelbaum, April 6, 1995, at 9.

⁶⁹ In *Mendoza v. M.C.I.* (F.C.T.D., no. IMM-2997-94), Muldoon, January 24, 1996, at 4: the Court stated that rape “... is a form of brutality especially utilizable for the humiliation and brutalization of women. It is not to be treated lightly ...”. See also *Arguello-Garcia v. M.E.I.* (F.C.T.D., no. 92-A-7335), McKeown, June 23, 1993. Reported: *Arguello-Garcia v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 285 (F.C.T.D.), at 287.

⁷⁰ *Vidhani v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 60, (T.D.), at 65.

⁷¹ *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.), at 324.

⁷² *Oyarzo v. Canada (Minister of Employment and Immigration)*, [1982] 2 F.C. 779 (C.A.), at 782.

⁷³ *Lai v. M.E.I.* (F.C.T.D., no. IMM-307-93), McKeown, May 20, 1994, at 2.

⁷⁴ See *Gidoiu v. S.S.C.* (F.C.T.D., no. IMM-2907-94), Wetston, April 6, 1995, at 1. See also *Porto v. M.E.I.* (F.C.T.D., no. A-1549-92), Noël, September 3, 1993, at 3. *Munoz v. M.C.I.* (F.C.T.D., no. IMM-2207-93), Pinard, November 28, 1994, at 3

⁷⁵ See discussion below.

⁷⁶ *Ward*, *supra*, at 739.

The meaning assigned to particular social groups in the Act should take into account the general underlying themes of the deference to human rights and anti-discrimination which form the basis for the international refugee protection initiative. The tests proposed in *Mayers*, *Cheung* and *Matter of Acosta*,⁷⁷ provide a good working rule to achieve this result. They identify three possible categories:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background, and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.

The analysis in *Ward* and updated Guidelines⁷⁸ have provided a more expansive and compressive framework for gender-related claims based on social group. Subsequent to *Ward*, Canada has made a number of legal judgments in favour of sex-trade workers and victims of trafficking.

In the case of *Litvinov v. M.B.I.*,⁷⁹ the Federal Court Trial Division granted asylum to a victim of forced prostitution on the basis of membership in a particular social group. The claimant, a citizen of Israel and formerly of the Ukraine, was lured into prostitution under the false premise of employment as a massage therapist. After being raped by one of her clients, she was threatened with death if she did not continue as a prostitute. She sought the protection of the police and the aid of a lawyer. After they were unable to assist her in an effective manner, Ms. Litvinov fled to Canada. Referring to *Ward*, the Federal Court found that the

⁷⁷ *Cheung v. Minister of Employment and Immigration*, [1993] F.C.J. No. 309 (Q.L.); *Mayers v. Canada* (Minister of Employment and Immigration) (1992), 97 D.L.R. (4th) 729; *Matter of Acosta*, Interim Decision 2986, 1985 WL 56042 (B.I.A.), see note 28.

⁷⁸ Providing that “the fact that the particular social group consists of large numbers of the female population in the country concerned is irrelevant,” - race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people; that gender is an innate characteristic and, therefore, women may form a particular social group within the Convention refugee definition; and “particular social groups comprised of sub-groups of women may also be an appropriate finding in a case involving gender-related persecution.” Canadian Immigr. And Review Bd., Guidelines On Women Refugee Claimants Fearing Gender-Related Persecution: Update (November 1996), available at http://www.cisr.gc.ca/en/about/guidelines/women_e.htm#AIII.

⁷⁹ *Litvinov v. M.B.I.*, (June 30, 1994) (S.C.P.B., IMM-7488-93).

Refugee Division had erred in its initial determination and stated that a social group may be defined as:

[N]ew citizens of Israel who are recently arrived from elements of the former Soviet Union and who are not integrated into Israeli society, despite the generous support offered by the Israeli government, who are lured into prostitution and threatened and exploited by individuals not connected to government, and who can demonstrate indifference to their plight by front-line authorities to whom they would normally be expected to turn for protection.

Following this trend in 1998, the Refugee Division decided in favour of another Ukrainian woman tricked into coming to Canada by an organised criminal group under the guise of obtaining employment as a waitress.⁸⁰ Although the claimant narrowly avoided being forced into prostitution, the Refugee Division found that she was a member of a particular social group of impoverished young women from the former Soviet Union recruited for exploitation in the illicit international sex trade. The Immigration and Refugee Board ("**Board**") stated:

[that] recruitment and exploitation of young women for the international sex trade by force or threat of force is a fundamental and aberrant violation of basic human rights. International refugee protection would be a hollow concept if it did not encompass protection of persons finding themselves in the claimant's position.⁸¹

The board further determined that it was a reasonable possibility that the claimant would be subject to abuse amounting to persecution at the hand of organised criminals upon her return to the Ukraine. It was also found reasonable that the claimant would not want to seek the protection of the State given its ineffectual attempt to combat organised crime and the links between organised crime and government.

Shortly thereafter, the Refugee Division also granted relief to a sex-trade worker in debt bondage.⁸² The claimant, a 22 year old citizen of Thailand, asserted a well-founded fear of persecution in Thailand by reason of membership in a particular social group identified as women and/or former sex-trade workers. In its majority decision, the Board stated that it would be wrong to adopt a narrow definition of social groups because one may find a particular "position to be amoral, distasteful, or undesirable."⁸³ The Board further proposed that the definition of social groups should be liberally applied to identify the claimant's particular social group as women. They went on to find a nexus based on her membership due to the fact that the victim's status as "a woman is a major cause of her predicament."⁸⁴

⁸⁰ Canadian Convention Refugee Determination Division, B95-02904, November 26, 1997.

⁸¹ See note 80.

⁸² Canadian Convention Refugee Determination Division, T98-06186, November 2, 1999.

⁸³ See note 80, at 6.

⁸⁴ *Id.* In support of this assertion, the Board cited the Supreme Court of Canada dissenting judgment in *Chan v. M.E.I.*, 3 SCR 593 (SCC 1995).

Alternatively, the Board determined that former sex-trade workers could also constitute a particular social group based upon the characterisation identified in *Ward*, as a group associated by former voluntary status, unalterable due to its historical permanence. Board Member Joel Bousfield stated:

[F]ormer sex trade workers can fall into this category. Sex trade workers are an associated group. Even if they do not choose to associate together, sex trade workers in almost any society, are easily identified and associated in the eyes of others. Most notably the police, as a particular group of people. Moreover, as the world's oldest profession, sex trade work has historical permanence. It has also been historically stigmatized and victimized the world over.

The Board further stated that the fact that the claimant may have made an individual choice to enter into the sex-trade did not necessitate a finding against social group, pointing to the Supreme Court's identification of three possible categories of social group, two of which expressly contemplate voluntary status in *Ward*. Accordingly, an unyielding, deterministic approach to social group analysis should not be utilised to cut off the claimant from Convention refugee status given the paramount concern for human rights. The Board cited as the critical fact that the individual woman cannot attempt to live freely in her home country without facing the significant possibility of serious harm, physical reprisals and continued sex trafficking. The absence of internal viable alternatives due to the lack of government protection and the fact that her persecutor could track her down were considered. Based on these facts, coupled with the credibility of the victim, the Board determined a possibility of harm existed based upon status as a 'woman and/or former sex-trade worker,' thereby constituting a Convention refugee.⁸⁵

It should be noted, however, that such victims have not always been granted Convention status in Canada. On one occasion, the Refugee Division determined that single women forced into prostitution did not constitute a particular social group based upon such status alone.⁸⁶ Findings against claimants have also been based upon the lack of nexus between social group and the persecuting behaviour,⁸⁷ as well as lack of credibility.⁸⁸ The factual

⁸⁵ See note 80, at 8.

⁸⁶ In 1999, the Refugee Division found that "single women who have been forced into prostitution" do not necessarily constitute a particular social group. This determination was based on the finding that the claimant was a victim of criminality, sexual exploitation by international organized crime. The Board determined that her fear of repercussions from those who wanted to target her because of her outstanding "debt bondage" had no nexus with the Conventional definition. Canadian Convention Refugee Determination Division, P98-06446, August 3, 1999.

⁸⁷ Also in 1999, the Board also found against a woman who based her claim on membership in a particular social group of single women without protection involved in the sex industry with an outstanding debt bond. In that case, the Division found that the claimant's fear of persecution stemmed from what she had done, mainly work as a prostitute, and not what she was. The Division pointed out that she was a well-educated woman with varied work experience who could have obtained many types of employment and was not a member of a particular and reasonable social group. As a victim of organized crime, she could not establish a nexus between her fear of persecution and a social group. Canadian Convention Refugee Determination Division, P99-01434R, August 25, 1999.

⁸⁸ See Canadian Convention Refugee Determination Division, TA0-04085, April 9, 2001. See also Canadian Convention Refugee Determination Division, T98-07677, May 26, 1999.

circumstances of each claimant is deeply considered by the Board, particularly with respect to nexus and credibility. Therefore, these decisions are highly individual and not necessarily determinative for all sex trade claimants.

V. LUXEMBOURG

A. Introduction

The Grand Duchy of Luxembourg has never examined the question whether asylum should be granted to trafficked individuals. The objective of this section is to analyse whether Trafficking Victims could benefit in Luxembourg from the protection of the Refugee Convention.⁸⁹

B. Discussion

1. Persecution

The concept of persecution is not defined under Luxembourg law, but Luxembourg administrative jurisdictions generally refer to the concept as defined by the Convention.⁹⁰ Furthermore, a proposal for a European Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection⁹¹ contains specific rules concerning the qualification for refugee status (“Rules”). Although no Luxembourg jurisdiction has referred to the Rules in any decision as yet, the Rules may be useful in defining the concept of persecution. Under the Rules, the following situations are deemed to constitute persecution:

- serious and unjustified harm (by virtue of its nature or repetition) because of race, religion, nationality or political opinion;
- legal, administrative, police or judicial measures implemented in a discriminatory manner;
- prosecution or punishment applied in a discriminatory manner.

The Handbook on Procedures and Criteria for Determining Refugee Status (“Handbook”) under the Convention is not legally binding in Luxembourg. Therefore, the violation of the rules set out in the Handbook is not considered by Luxembourg administrative jurisdictions to justify the overriding of a ministerial decision refusing to grant refugee status.⁹²

In order to be considered a “well-founded fear” under Luxembourg law, the persecution must have occurred or must be likely to happen in the ‘home’ country of the applicant. In the case

⁸⁹ See note 4.

⁹⁰ Administrative Tribunal, case dated 25-7-01, N°12.630, Administrative Tribunal, case dated 8-1-01, N°12290, confirmed by the Administrative Court in a case dated 3-5-01, N° 12877C.

⁹¹ [COM(2001) 510 final - Official Journal C 51 E, 26.02.2002].

⁹² Administrative Tribunal, case dated 10-11-2000 N°12390, confirmed by the Administrative Court in a case dated 11-1-01, 12602C.

of a trafficked victim for which the sexual abuse occurred in Luxembourg, the fear of persecution may perhaps lie in the risk of being ‘re-trafficked’ or the fear of punishment by members of the traffic network in the home country. Such a case has never been brought in a Luxembourg jurisdiction. However, Luxembourg case law has already allowed an application where the applicant, a member of an opposition political party, had received death threats in his home country.⁹³ Death threats in the home country are regularly used by trafficking networks as a means of control of their victims, so in advocating for refugee status on behalf of trafficking victims, the existence of such would certainly be a critical factor.

The Luxembourg authorities have always agreed that the general situation of the home country has to be examined before any decision can be made, and that such situation must be examined at the date of the decision, and not at the date the Applicant left her home country.⁹⁴ For instance, Yugoslavia was considered as fulfilling the objective test during the war. Iran has also been considered as fulfilling the objective test even though the courts generally approved the efforts made by the Iranian government to ensure better protection of human rights.⁹⁵ Albania has also been considered to fulfil the objective test.⁹⁶

Even if, as mentioned above, the general situation in the country of origin is relevant to the question of whether to grant refugee status to the applicant, the Luxembourg authorities consider that the general situation is not in itself sufficient to ground a successful claim for asylum, and therefore they will also consider the individual situation of the applicant.⁹⁷ Moreover, the Luxembourg authorities generally refuse to grant refugee status when an Applicant has the opportunity to avoid the persecution in his home country.⁹⁸

Under Luxembourg law, an applicant who is persecuted in the home country will only benefit from the protection provided by the Convention if the authorities of the home country do not themselves protect the applicant, and where this lack of protection is based on one of the five reasons mentioned under article 1 of the Convention.⁹⁹ The concept of protection does not imply an absolute protection of an individual’s physical integrity, but requires the home country’s authorities to take measures in order to prevent the abuse and instigate adequate levels of criminal proceedings. Furthermore, the applicant must have already unsuccessfully sought this protection.¹⁰⁰

⁹³ Administrative Tribunal, case dated 28-11-01 N°12392.

⁹⁴ Administrative Court 23-10-01 N°13878C; Administrative Court 23-10-01 N°13841C.

⁹⁵ Administrative Tribunal, case dated 4-3-02 N°13802.

⁹⁶ Administrative Tribunal, case dated 18-7-01 N°12391.

⁹⁷ Tribunal Administratif, 27-2-97, N°9571, confirmed by the Administrative Court in a case dated 25-9-97, N°9870C.

⁹⁸ Administrative Tribunal, case dated 3-7-01 N°12888, confirmed by the Administrative Court in a case dated 20-11-01, 13819C.

⁹⁹ Administrative Tribunal, case dated 14-11-2000 N°12055, confirmed by the Administrative Court in a case dated 27-3-01, 12646C.

¹⁰⁰ Administrative Tribunal, 9-8-2000, N°11937, confirmed by the Administrative Court in a case dated 30-11-2000, 12304C.

2. “On Account of” Membership in a Particular Social Group

There is no specific case law on the concept of “particular social group,” nor on the definition of the “social group.” However, minority political groups,¹⁰¹ members of the same family,¹⁰² ethnic¹⁰³ or religious¹⁰⁴ minorities generally are considered to be groups/categories in Luxembourg. For instance, the fact that the members of a family have received threats of death or have been assassinated in their country of origin is generally considered to be sufficient to conclude that all members of that family have a subjective fear of persecution.¹⁰⁵

There are no Luxembourg decisions which consider whether age, gender, family involvement (when victims of trafficking networks are sold by their family) are categories which would allow the Applicant to benefit from the protection provided by the Convention. However, there are no decisions rejecting these factors either.

VI. THE UNITED KINGDOM

A. Introduction

The U.K. ratified the Convention on 11 March 1954. This section, in turn, provides a brief overview of how the U.K. has addressed the issue of gender based asylum claims.

B. Discussion

1. Persecution

The Immigration Appellate Authority’s (“**IAA**”) Asylum Gender Guidelines (“**the Gender Guidelines**”)¹⁰⁶ encompasses the approaches established by U.K. case law through a two prong test:

- (1) a violation of human rights which amounts to serious harm; and
- (2) against which the state is unwilling or unable to offer effective protection.

In the first prong, the Gender Guidelines refer to James Hathaway’s authoritative book, *The Law of Refugee Status*,¹⁰⁷ for an assessment of those violations of human rights amounts to serious harm, and therefore rises to the level of persecution. A distinction is made between

¹⁰¹ Administrative Tribunal, case dated 11-12-2000 N°12297, confirmed by the Administrative Court in a case dated 22-3-01, 12743C.

¹⁰² Administrative Tribunal, case dated 28-11-01 N°12392.

¹⁰³ Administrative Tribunal, case dated 17-10-01 N°12991; Administrative Tribunal, case dated 17-10-01 N°13121.

¹⁰⁴ Administrative Tribunal, case dated 4-3-02 N°13802.

¹⁰⁵ Administrative Tribunal, case dated 28-11-01 N°12392; Administrative Tribunal, case dated 18-7-01 N°12388.

¹⁰⁶ Immigration Appellate Authority, *Asylum Gender Guidelines* November 2000. NB, so far as the authors are aware, no similar guidelines exist for specific first-instance decision-making.

¹⁰⁷ *The Law of Refugee Status* - James C. Hathaway (1991) - Butterworths.

treatment that may be merely discriminatory, and that which results in slavery and forced servitude, or physical violence such as torture, cruel, inhuman or degrading punishment or treatment.

It was established in the House of Lords case *Horvath*¹⁰⁸ that persecution could be attributed to non-state agents. *Horvath* discussed both the ‘accountability’ theory and the ‘protection’ theory of action. Under the accountability theory, refugee status is only granted if the persecution can be attributed to the state. This means the state must either be involved in the persecution, or unable or unwilling to do anything to stop it. The accountability theory is followed in France and Germany.

The U.K., amongst other countries, subscribes to the ‘protection’ theory. This means that if the person does not have the benefit of protection from persecution in her own country, she should be granted protection under the Convention. The broader safeguard offered by the protection theory is that refugee status may be granted where the state is unable to provide protection, or where there is no effective government or state authority. Since the availability of state protection varies widely from country to country, it is important to determine the standard of protection that is expected under the Convention.

Horvath finds that the state should be able to protect its citizens in relation to the ‘core’ entitlements which are recognised by the International Community. Applying this standard, a woman trafficked for prostitution would have to establish that the state authorities in her own country either:-

- colluded/turned a blind eye to the trafficking;
- do not have the resources or capacity to tackle the problem effectively; or
- do not exist as a competent effective government.

2. “On Account of” Membership in a Particular Social Group

In the U.K., following guidelines and judicial precedent, a woman’s membership in a particular social group is defined by three questions:

- (1) What is the ‘particular social group’ in that instance and can the group be defined?
- (2) Does that group have an identity in the origin country (i) in the eyes of the persecutors; or (ii) in the eyes of the general community?
- (3) Do the members of that social group have ‘shared immutable characteristics’? A characteristic will be considered immutable if it is (i) beyond the power of the individual to change because it is innate and unchangeable or because it is a former characteristic which cannot now be changed; or (ii) so fundamental to their identity, their human dignity or conscience that they ought not to be required to change it.¹⁰⁹

¹⁰⁸ *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 HL.

¹⁰⁹ See note 106.

This formulation is based upon the reasoning of the United States Board of Immigration Appeals (“**BIA**”) in the *Matter of Acosta*,¹¹⁰ a case which has been widely followed in other jurisdictions, including the U.K.¹¹¹

The 1999 House of Lords precedent decision, *Islam and Shah*,¹¹² establishes the judicial reasoning applicable to considerations of a person’s membership of a “particular social group”. This joined case evaluated the positions of two married Pakistani women who sought refugee status in the U.K. having fled their homes in Pakistan. They were initially denied refugee status by the Secretary of State for the Home Department. Both women had been accused of adultery in Pakistan and were therefore, if returned home, subject to criminal proceedings for sexual immorality. If found guilty (which was almost certain to be the case given the prevailing discrimination against women at that time), their punishments could include public flogging, or stoning to death.

Their Lordships held that the women were entitled to protection under the Convention¹¹³ given the evidence that in Pakistan, violence and discrimination against women was tolerated by the state, despite constitutional guarantees of equality. The judges in *Islam and Shah* examined the position of social groups based on gender, sexual orientation, family ties, class or caste, and voluntary association. They concluded that all these can validly fall within the Convention, depending on the facts in the specific cases, whilst also maintaining that the membership category is not ‘all encompassing’.

The precedential decision of *Islam and Shah* created the framework upon which trafficked women’s membership in a particular social group is likely to be considered. This primarily means that such members should be identifiable: “*where the individuals who form part of the ‘particular social group’ have been set apart by the norms of customs of that society, so that all people who have their particular characteristic are recognised as being different from all the others in that society*” and that the social group exists independently of the persecution. Under this framework, a trafficking victim cannot be considered a member of a particular social group simply because she was trafficked, but rather, there has to be some other factors that put her at risk. These may include age, poverty level, education, family circumstances, et cetera.

In *Islam and Shah*, Counsel for the appellants contended that three characteristics set the appellants apart from the rest of society, namely their gender, the suspicion of adultery, and their unprotected status. It was submitted that these three characteristics existed independently of the persecution. Lord Steyn agreed that these characteristics do not of themselves involve an assertion of persecution and continued: “*The cases under consideration can be compared with a more narrowly defined group of homosexuals, namely practising homosexuals who are unprotected by a state. Conceptually, such a group does not in a relevant sense depend for its existence on persecution. The principle that the group must exist independently of the persecution has an important role to play. But counsel for the Secretary of State is giving it a reach which neither logic nor good sense demands.*”

^{110.} See note 28.

^{111.} See *Islam v SSHD; R v IAT ex parte Shah (HL)* (1999) INLR 144.

^{112.} See note 111.

^{113.} See note 4.

During the hearing, Lord Hoffmann presented the view that the social group in question was simply made up of ‘women in Pakistan’ on the basis that they are discriminated against and as a group they are unprotected by the state. *“The analogy of discrimination against homosexuals who may in some countries be a ‘particular social group’ supports this reasoning.”* The countering argument, that some Pakistani women are able to avoid being persecuted, was not sustained. The fact that some members of the group are not subject to persecution does not lead to an assumption that the group is not therefore persecuted. The court referred to the experiences of targeted groups in Nazi Germany and Stalinist Russia, some of whose members escaped persecution. *“To treat this factor as negating a Convention ground under Article 1A(2) would drive a juggernaut through the Convention”*.

Islam and Shah appears to have applied a broader interpretation of social group than other similar decisions in the U.K. For example, the case of *Quijano*¹¹⁴ considered a claim of refugee status based on membership in a particularly family. In *Quijano*, refugee status was denied where the individual feared persecution based on his stepfather’s refusal to co-operate with criminal gangs, not from the family’s civil or political status. In that case the Court commented: *“Where the agent of persecution is the State that necessary element will readily be found. Where the only persecution is criminal activity then the ingredient will be hard to demonstrate. That is consistent with the objectives of the Convention. The victim of crime ordinarily looks internally to the State for protection. Of course if the State colludes with crime then the State becomes itself the agent of persecution.”* In a similar case,¹¹⁵ an Albanian citizen claimed asylum on the basis that his family was involved in a blood feud. The Court of Appeal refused to grant asylum as the claimant could not show that society as a whole had marked his family out as a separate group. The blood feud was essentially a private matter. Additionally, there was no element of state involvement or tolerance of the conduct in question.

“A particular social group” was also not found where it involved state-employed midwives who were being targeted with violence by fundamentalists.¹¹⁶ The court decided that the expression ‘particular social group’ will not ordinarily cover a body of people based only upon the work they do. In coming to this decision, the court considered that the characteristic which defines a social group must be one which the members of that group should not be required to change as it is fundamental to ‘their individual identities or conscience’. It was the decision of the court that shared duties in midwifery did not come within that principle. Interestingly, the court’s decision was made despite the evidence that the midwives were being targeted because the State expected them to teach contraception, to which the fundamentalists were opposed, and that the state was unable to provide protection.

VII. CONCLUSION

The United Nations adopted the Refugee Convention in response to a global need to ensure the basic rights of refugees. Presently, trafficked women, as victims of a modern-day slavery, are suffering egregious human rights violations and are clearly in need of such protection within the international community. One way to accomplish that would be to recognise

¹¹⁴ [1997] Imm AR 227

¹¹⁵ *Skenderaj c Secretary of State for the Home Department* [2002] EWCA Civ 567.

¹¹⁶ *Ouanes v Secretary of State for the Home Department* [1998] 1 WLR 218.

victims of trafficking as refugees. While groups targeted due to sex or gender are not explicitly mentioned within the Convention definition of a refugee, there is no reason to assume that such victims were intended to be denied protection. In fact, it would run counter to the controlling humanitarian principles of non-discrimination and non-refoulement to confine the Refugee Convention language so narrowly. As previously discussed, the UNHCR and other members of the international community have repeatedly called for the recognition of gender as one of the protected grounds, particularly those persecuted through sexual violence.

As signatories to the Refugee Convention, the United States, the United Kingdom, France, Canada and Luxembourg have all adopted a form of the Convention definition of refugee requiring a showing of well-founded fear and persecution on the enumerated grounds. In recent years, the U.S., U.K. and Canada have begun to respond to the pleas of advocates to take a more expansive and gender sensitive understanding of these requirements with the creation of gender guidelines. These gender guidelines have been increasingly recognized within the case law of these states.

As a leader in international human rights, Canada has found that trafficking victims fall within its understanding of the definition of a Convention refugee, having granted asylum to a number of victims. The Refugee Division has recognized former sex trade workers as a potential social group, and, in *Litvinov v. M.B.I.*, the Federal Court Trial Division considered a combination of factors, including gender, to determine membership in a particular social group based upon the individual circumstances of the victim.

Luxembourg has not yet examined the question of whether asylum should be granted to trafficked individuals, which may be attributable in part to the fact that this state is not a frequent destination country for traffickers. Despite the lack of case law, the conceptual framework presently in place would support a grant of asylum, if the victim can establish membership in a particular social group. Like Luxembourg, France has not determined whether victims will qualify for asylum status. However, the French cases analysed indicate that France may be willing to consider a finding of a particular social group based upon gender alone if such a social group is clearly denied the protection in the home country.

Similarly, neither the U.S. nor the U.K. has yet to make a favourable determination based upon sex trafficking status alone. Like Canada, these states have recognized instances in which rape and other sexual violence constitute violations to human rights and dignity rising to the requisite level of persecution. Therefore, it appears that credible victims, as assessed on a case-by-case basis, will be able to make a case of well-founded fear of persecution. However, the major hurdle is whether such persecution will be “on account of” one of the five enumerated grounds. The most applicable ground would be “membership in a particular social group.”

Matter of Acosta, a precedential decision of the U.S. Board of Immigration Appeals, has been widely cited in the U.S., U.K. and Canada to establish that common, immutable characteristics, such as sex, are largely determinative in social group analysis. However, legal research has indicated that, in these states, as in many others, gender alone is considered too vast of an association to establish membership in a particular social group. Nevertheless,

case law has indicated that when gender is coupled with other factors relevant to this type of persecution, such as race, ethnicity, family ties, economic conditions and voluntary association, it is possible to establish a social group.

Because trafficking victims do not fit neatly within the Refugee Convention definition and applicable jurisdictional law, some states have enacted specific legislation in response to this global human rights crisis. In 2000, the U.S. adopted trafficking legislation specifically aimed at both prevention of trafficking and protection of trafficking victims. Similarly, France has recently enacted Law 2003-239 of March 18, 2003 which encourages victims to report traffickers to the police. In return, the victim may be granted a residence and work permit, as well as rehabilitation assistance. In the U.K., with the imminent implementation of the Sexual Offenses Bill, the government is increasing its efforts at prevention by more heavily punishing. This legislation, however, fails to provide the necessary protection to trafficked victims. It is imperative that the state also meet the needs of victims by providing humanitarian relief in the form of asylum under the Refugee Convention. Under the Refugee Convention, it was the intention of the United Nations to assure refugees the widest possible exercise of human rights and freedoms. Therefore, it should be explored as a measure to protect victims of human trafficking.